DEPARTMENT OF STATE REVENUE

04-20090748.LOF

Letter of Findings: 09-0748
Sales and Use Tax
For the Years 2006, 2007, 2008

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ISSUES

I. Use Tax – Electronic Subscriptions.

Authority: IC § 6-8.1-5-1; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-1-27.5; IC § 6-2.5-4-6; Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Sales Tax Information Bulletin 8 (May 2002).

Taxpayer protests the imposition of use tax on online electronic subscriptions.

II. Tax Administration – Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the assessment of negligence penalty.

STATEMENT OF FACTS

Taxpayer operates a pre-owned vehicle dealership in Indiana. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer for the years 2006, 2007, and 2008, which resulted in the assessment of additional sales and use tax, penalty and interest. Taxpayer agreed to the sales tax and some of the use tax issues and remitted partial payment. Taxpayer protested the use tax assessments on what the audit termed "electronic database subscriptions" and penalty. A hearing was held and this Letter of Findings ensues. Additional facts will be provided as necessary.

I. Use Tax – Electronic Subscriptions.

DISCUSSION

The Department found that Taxpayer had purchased "online database subscriptions" and credit reports on which no sales tax was collected or use tax remitted to the Department. The Department's audit proceeded to impose use tax on those items.

The Department notes that all tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(b), (c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-3-2(a). A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2. An exemption from the use tax is granted for transactions when sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4.

In this case, the audit found that Taxpayer had made purchases which were subject to sales tax but failed to pay that tax. Therefore, the audit assessed the complementary use tax. Taxpayer protests arguing that it is purchasing a non-taxable service. Taxpayer makes several other points in support of its protest which are addressed here first.

Taxpayer argues that the Department determined in an audit of another entity that Carfax, Experian, and First Advantage Credco were not taxable. Taxpayer references Letter of Findings ("LOF") 07-0173 in support of its protest. It is not clear if this is the LOF Taxpayer is referring to relating to the items listed above it claims the Department found to be non-taxable. That LOF addressed the Department's assessment of sales and use tax on a taxpayer providing access to its proprietary website. The Department first reminds taxpayer that each LOF or other document issued as a result of an administrative hearing or procedure relies on facts and circumstances specific to a particular taxpayer. The LOF Taxpayer refers to does not detail facts nor does it reference specific products or subscriptions, so it cannot be relied on for purposes of this protest. In materials submitted with a letter dated August 25, 2009, Taxpayer references LOF 05-0123, however it is not clear how Taxpayer argues this LOF in support of its protest since the LOF contradicts Taxpayer's argument.

Taxpayer also references IC § 6-2.5-1-27.5(c)(1) which, as it states, excludes from the definition of telecommunications "[d]ata processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser whose primary purposes for the underlying transaction is the processed data or information." Based on this fact, Taxpayer states it should not be taxed for online reports since "electronic data purchased" is specifically excluded from the term "telecommunications services" which are taxed at IC § 6-2.5-4-6. First, IC § 6-2.5-1-27.5, did not come into effect until January 1, 2008, therefore it does not apply to the years at issue. Secondly, even if Taxpayer's statutory

analysis were correct, all that is suggested is that "electronic data purchased" is not taxed as a telecommunications service. It does not mean that "electronic data purchased" are not otherwise taxable as something else.

A. Credit/Vehicle Reports: CARFAX and National Credit Center ("NCC").

Taxpayer asserts that the costs for the credit/vehicle reports constitute services that are not subject to sales and use tax. Taxpayer stated that it subscribed to services from a vendor-repositories - i.e., CARFAX (vehicle history) and NCC (TransUnion and Experian credit history) - that provided credit/vehicle reports to Taxpayer under the respective agreements. Taxpayer maintains that there is no report available to purchase until information is furnished by Taxpayer. When that information is provided the vendor compiles the report and sells the finished report to the Taxpayer. Taxpayer also maintains that the vendor(s) provide the credit information for the exclusive use of the taxpayer for a specific purpose and only if the taxpayer requests the information by providing specific confidential input.

During the course of the protest, Taxpayer provided sample invoices from each vendor that indicated that Taxpayer was billed a certain set amount for each report provided to Taxpayer. Taxpayer also provided "agreements" from CARFAX and NCC which also detail the amounts that Taxpayer would be charged per report. Nowhere in the agreements does Taxpayer gain exclusive use and right of control of compiled information, which was supplied by Taxpayer to the vendor to be merely organized by the vendor. Nowhere in the agreements does Taxpayer gain exclusive right to any specific information. Nowhere in the agreements does Taxpayer specify that vendors collect specific and customized information for Taxpayer to become the sole owner of the information.

In fact, the typical arrangement for these credit/vehicle reports works as follows: with a user-name and password given by the vendor-repository, Taxpayer can search, retrieve, and print what is produced and offered by the vendor-repository. Upon Taxpayer's demand, i.e., entering the search term or terms (typically an individual's name or vehicle's VIN number), the vendor-repository transferred the credit/vehicle reports to Taxpayer and Taxpayer then paid the vendor-repository for the credit/vehicle reports based on the volume of the reports Taxpayer purchased. Taxpayer received the credit/vehicle reports, either in printout form, by electronically storing them in its computer, or simply by viewing the generated reports. Essentially, Taxpayer requested an individual credit/vehicle report for one of its potential customers and was billed for each credit/vehicle report requested or was charged a flat fee for either unlimited access or a maximum number of records depending on the type of arrangement. The issue is whether this "information" or credit/vehicle report is subject to sales tax and use tax.

The issue of whether that "information" is subject to sales and use tax is addressed in the Sales Tax Information Bulletin 8 (May 2002) which states as follows:

> The sale of statistical reports, graphs, diagrams or any other information produced or compiled by a computer and sold or reproduced for sale in substantially the same form as it is so produced is considered to be the sale of tangible personal property unless the information from which such reports was compiled was furnished by the same person to whom the finished report is sold.

Taxpayer purchases credit/vehicle reports. The vendor-repository compiled the individual credit/vehicle information, in report formats, and sold the reports in substantially the same form as they were produced. Taxpayer did not contract with the vendor to perform and provide a service, such as collecting specific and customized information or compiling Taxpayer's information. Instead, Taxpayer purchased the completed products, i.e., credit reports/vehicle reports, after the vendor compiled and furnished standard information in the standard report formats. The reports consist of information "compiled by a computer [and] sold or reproduced for sale in substantially the same form as it is so produced...." Therefore, the reports – by whatever means transmitted – constitute "tangible personal property" obtained in a retail transaction. Pursuant to Sales Tax Information Bulletin 8, the credit reports/vehicle reports are tangible personal property and, therefore, taxable. Since Taxpayer did not pay sales tax at the time of the purchases, use tax is properly imposed.

B. DealerTrack/DealWatch.

Taxpayer also asserts that the fixed cost it pays to DealerTrack for its DealWatch product also constitutes payment for services and are therefore not taxable. Taxpayer described its use of DealWatch as follows – Taxpayer inputs data from credit card application and from the credit reports into this system and then "checks the box" next to the lenders to whom it wishes to transmit the information – essentially lender application data. The lenders then receive the data and respond accordingly either agreeing to provide financing or not. Taxpayer stated that lenders no longer accept hardcopies of financing applications, thus this is the preferred method. Taxpayer also states that the system allows for long-term electronic storage of the information. Taxpayer states that DealerTrack does not place any software on its computers; Taxpayer states that it accesses DealerTrack's DealWatch website with a password.

The following descriptions of the products were found at DealerTrack's website (http://ir.dealertrack.com/releasedetail.cfm?ReleaseID=263655) (last accessed April 27, 2010):

> DealerTrack is the leading on-demand software and data solutions for the U.S. automotive retail industry. Our solutions enable dealers to receive consumer leads, submit credit applications, compare financing and leasing options, sell insurance, vehicle accessories and other aftermarket products, document compliance,

and execute financing contracts electronically.

[...]

DealWatch, introduced in 2006 and fully integrated with the DealerTrack network, is a robust compliance solution that helps dealers monitor the gathering and handling of sensitive customer information, signature capture, customer identity verification and more. DealWatch encrypts customer information and stores sensitive data in a secure electronic filing cabinet - helping to avoid the liability that unsecured paperwork can pose. Customers can sign documents electronically, and auditable records of who accessed the information and when are created and stored automatically. The solution also enables dealers to monitor deal activity to ensure that every employee is following the same steps, which can help prevent mistakes and costly litigation.

The description Taxpayer presented at the hearing of its use of this product is somewhat confusing in light of DealerTrack's description above. Taxpayer provided an application and pricing schedule for DealerTrack that is titled "Premium Component Addendum to DealerTrack Access Agreement," but the document does not describe what DealWatch actually does, but rather it offers various module options with some pricing information.

DealTracker's description suggests that DealWatch is more like pre-written software, however, there is insufficient information to make that determination. Since, as stated above, Taxpayer bears the burden of showing that its protest is correct, this Letter of Findings supports the Department's determination.

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration – Negligence Penalty.

DISCUSSION

The Taxpayer also protested the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at 45 IAC 15-11-2(c) as follows:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

(1) the nature of the tax involved;
(2) judicial precedents set by Indiana courts;
(3) judicial precedents established in jurisdictions outside Indiana;
(4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
(5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer has affirmatively established, as required by 45 IAC 15-11-2(c), that its failure to pay sales tax on its purchases was due to reasonable cause and not due to negligence.

FINDING

Taxpayer's protest is sustained.

CONCLUSION

Taxpayer's protest of the assessment of use tax on what the audit labeled as "electronic database subscriptions" is denied.

Taxpayer's protest of the negligence penalty is sustained.

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